82-24

Office - Supreme Court, U.S.
FILED
OCT 27
No. 82-24
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

---

No. 81-114

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRANCIS FORD, INC.

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

# RESPONDENT'S BRIEF ON MOOTNESS

---

Michael J. Esler
ESLER & SCHNEIDER
519 S.W. Park Avenue
Suite 510
Portland, Oregon 97205
(503) 223-1510

Counsel for Respondent

TABLE OF AUTHORITIES


| | Page |
|---|---|
| **Cases:** | |
| Adickes v. S.J. Kress & Co., 398 U.S. 144 (1970) | 3 |
| Doyle v. F.T.C., 356 F.2d 381 (5th Cir. 1966) | 4 |
| Giles v. Maryland, 386 U.S. 66 (1967) | 3 |
| Mechling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961) | 6 |
| United States v. Bestline Products Corp., 412 F. Supp. 754 (N.D. Cal. (1976) | 4 |
| United States v. Concentrated Phosphate Export Assn., 393 U.S. 199 (1968) | 5 |
| United States v. Munsingwear, 340 U.S. 36 (1950) | 7 |
| **Statutes and Regulations:** | |
| 5 U.S.C. § 504 | 5 |
| 15 U.S.C. 45(m)(1)(B) | 7 |

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

---

No. 81-1114

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRANCIS FORD, INC.

---

# RESPONDENT'S BRIEF ON MOOTNESS

---

This Court has requested Francis Ford, Inc.'s ("Francis Ford") response on the issue of mootness first raised by the Federal Trade Commission's Reply Brief (at 1-2) following a suggestion to that effect made by Amicus Curiae. National Automobile Dealers Association ("NADA") in its Brief in Opposition (at 15-16). The only basis for the suggestion is NADA's unsupported

assertion that Francis Ford is out of business.

Francis Ford and its controlling shareholders, officers, and directors protest any suggestion that this case may be moot. The following will point out some of the reasons for this objection, but will be kept brief as the issue does not warrant great length.

1. Francis Ford is not "out of business." It is a corporation in good standing, organized and existing under the laws of the state of Oregon. It is as responsible today for the disposition of repossessed cars both to its recourse lenders, including Ford Motor Credit Corporation and a local bank, and to the consuming public, as it was in February 1976. Nothing has happened to release it or its principals from these responsibilities.

Moreover, the suggestion of mootness goes beyond any evidence in the record and ignores this Court's rule prohibiting argument from the addition of new or different evidence that is

not part of the certified record. Adickes v. S.J. Kress & Co., 398 U.S. 144, 157-58, n. 16 (1970). To the extent that this Court's request to Francis Ford for a response may be deemed a request that it supply the Court with supervening facts, if any, Giles v. Maryland, 386 U.S. 66, 74, 80 (1967), then this brief should be deemed to be Francis Ford's response that the case is not moot because it is not out of business.

2. Even if Francis Ford were no longer responsible for repossessions, the case would not be moot. The Commission's Order was binding on Francis Ford and its successors and assigns. Commission's Order, Petition, App. D. at 58a. While no such successors now exist, any sale of its business would be subject to the Cease and Desist Order.

Additionally, while Francis Ford is the only named respondent involved in this appeal, the Commission's Cease and Desist Order applies

with equal force to regulate all persons connected with Francis Ford. The order applies specifically to:

> "... its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension and enforcement of motor vehicle retail credit obligations, and in connection with the disposition of repossessed motor vehicles, in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act, as amended) ... ." Commission's Order, Petition, App. D., at 62a.

Doyle v. F.T.C., 356 F.2d 381, 384 (5th Cir. 1966) (FTC orders are automatically binding on the officials of a corporation responsible for its affairs); United States v. Bestline Products Corp., 412 F. Supp. 754, 764-65 (N.D. Cal. 1976).

Thus, even if through some future happenstance Francis Ford had no further interest in the case on its own behalf, its officers, agents, employees, and others connected with it would have the same economic

interest in pursuing this appeal diligently in its name if they intended ever to be involved again in retail motor vehicle sales. United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 202-03 (1968) (case is not moot because the dissolved association's members were also prohibited from future activity).

3. Francis Ford itself has a strong economic interest in pursuing this case to an ultimate and favorable conclusion, regardless of the impact of the Commission's Order on the future business activities of Francis Ford, its officers, and related persons. If it is successful on this appeal, Francis Ford has the right to seek recovery of its costs, legal fees, and other expenses of defending this matter over the period which now already spans almost seven years. See, 5 U.S.C. § 504, which provides, in relevant part, that:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the

> United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances made an award unjust.

4. Finally, the Commission suggests that if the case is now moot, it would be appropriate to roll the proceedings back to vacate the Ninth Circuit decision and leave the Commission's Cease and Desist Order standing. Petitioner's Reply Brief, at 2. This is unfair. In United States v. Munsingwear, 340 U.S. 36, 39-40 (1950), the Court said:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. ... That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the

statutory scheme was only preliminary. 340 U.S. at 39-40.

Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 329-30 (1961) (Munsingwear rule applies in administrative cases).

Although the Commission seeks to remove "uncertainty" in the administrative process it claims this case has created, id. at 2, the Commission does not suggest that its Cease and Desist Order be vacated. But if Francis Ford were unable to pursue this appeal, then the Commission's Order, which the Ninth Circuit rejected, would be reinstated. Not only would such a result be unfair to Francis Ford and its related personnel, but it also subjects the entire retail automotive sales industry to the impact of a Cease and Desist Order that the Ninth Circuit has invalidated. See, e.g., Section 5(m)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. 45(m)(1)(B); NADA Brief in Opposition, at 9. NADA, through its

efforts on appeal as Amicus Curiae on behalf of the members of the industry who may be bound by any final Cease and Desist Order against Francis Ford, ensures the issues raised in this appeal will be diligently and completely litigated.

DATED this 26 day of October, 1982.

Respectfully submitted,

ESLER & SCHNEIDER

Michael J. Esler